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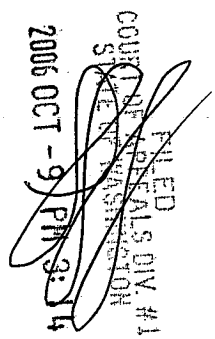

Nos. 58030-2-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

MICHAEL MILLER; VICKI RINGER; and JOANNE FAYE TORGERSON, as trustee for the TORGERSON FAMILY TRUST;

Plaintiffs/Appellants,

v.

ONE LINCOLN TOWER, LLC; BELLEVUE MASTER, LLC; and LS HOLDINGS, LLC,

Defendants/Respondents/Cross-Appellants.

APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
HONORABLE JEFFREY RAMSDELL

REPLY BRIEF OF RESPONDENTS

Nold & Associates, PLLC
David A. Nold, WSBA #19009
Brian M. Muchinsky, WSBA #31860
Attorneys for Respondents/Cross-Appellants

10500 NE 8th Street, Suite 930
Bellevue, Washington, 98004
Telephone: (425) 289-5555
Facsimile: (425) 289-6666

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I. REPLY ARGUMENT AND AUTHORITY

A. Respondents Are Entitled to Their Attorney Fees, Either Under RCW 4.84.330 or the Agreement.

Buyers claim that RCW 4.84.330 does not apply because the attorney fee provision is bilateral. (Reply, p. 27.) This assertion ignores the extensive authority cited by Respondents in their opening brief that have expanded the definition of bilaterality. If the Agreement is bilateral, Respondents are entitled to their fees without resort to the statute. If the Agreement is not bilateral, as the trial court held, then RCW 4.84.330 compels that the provision be so construed. Regardless of whether this Court rules that the Agreement provides for Respondents' fees without need of RCW 4.84.330 or that the statute compels a result despite the parties' agreement, the trial court erred and this Court should reverse.

In one sense, there is merit in Buyers' characterization of RCW 4.84.330. They are correct when they note that where an "agreement already contains a bilateral attorneys' fee provision, RCW 4.84.330 is *generally* inapplicable." *Hawk v. Branjes*, 97 Wn. App. 776, 780, 986 P.2d 841 (1999) (emphasis added). However, in such situations, attorney fees are recoverable by virtue of the bilateral agreement.

Buyers make inconsistent arguments that demonstrate that the trial

court erred in denying Respondents their fees. First they claim that, as the Agreement was written, it could not award fees to Respondents for prevailing in this action. "Developer's efforts to have this Court re-write the Contract to now state a party who substantially prevails against another party . . . should not be countenanced." (Reply, pp. 26-27.) In the next paragraph, they claim that the attorney fee provision is bilateral. (Reply, p. 27.)

The inconsistency of these assertions is demonstrated by the analysis of bilaterality cases presented in Respondents' Opening Brief and will not be repeated here. However, to summarize them: under Washington law, an attorney fee provision that only allows one side to recover its fees is **by definition** a unilateral attorney fee provision. (See Respondents' Opening Brief, pp. 42-46.) Because Buyers' brief contains no analysis of these cases, it offers no clarification to resolve the inconsistency. Buyers seemingly hope that ignoring the cases will preclude the Court from considering their import.

At its essence, Buyers' argument is that they should have been permitted to sue Respondents for specific performance and be entitled to their fees **regardless of the outcome of the case**, simply because they rejected the return of their earnest money. This contradicts Washington law. A bilateral attorney fee provision entitles the prevailing party to an action to recover its fees. If the Agreements at issue have such a clause, Respondents should

receive their fees under it.

Conversely, if the Agreement contains a unilateral fee provision, as Buyers argue and the trial court ruled, then RCW 4.84.330 expressly applies. While Buyers understandably chafe at the notion of the Court rewriting the Agreement with regard to attorney fees (assuming *arguendo* that it is unilateral) when it cannot with respect to the available remedies, that is the law. "RCW 4.84.330 is relevant in any given case only to the extent that the statute overrides the parties' intent on matters covered by the statute." *Hawk*, 97 Wn. App. at 779. Further, "[t]he intent of the statute is to level the playing field by allowing either party to recover fees and costs if they prevail." *Hawk*, 97 Wn. App. at 779-80.

Thus, while Washington law applies a rigorous standard before it will rewrite private parties' agreements regarding limitations of remedy, it is particularly willing to award attorney fees to one party when fees would have been awarded to the opposing party had it prevailed. Buyers would have been awarded their fees had the prevailed on the gravamen of the action. Instead, Respondents prevailed. Therefore, an award of fees to Respondents is not anomalous; it comports precisely with established Washington law.

B. If Buyers Made Contractual Claims for the Return of Their Earnest Money, They Are Distinct and Severable from Their Claims for Damages and Specific Performance for Purposes of the Proportionality Approach.

Buyers argue on reply that the proportionality approach does not apply because it only applies "where a party receives an affirmative judgment on only a few distinct and severable claims." (Reply, p. 27, citing *Mike's Painting v. Carter Welsh, Inc.*, 95 Wn. App. 64, 68, 975 P.2d 532 (1999).) Buyers then assert that they "only brought one contract claim." (Id.) If they truly brought only one contractual claim for purposes of this analysis, it was a claim for specific performance or vast monetary damages. On such a claim, Respondents prevailed (hence Buyers' appeal of its dismissal). Thus, if Buyers asserted a contractual claim to which they are entitled to judgment rendered in their favor, it is only for the return of their earnest money and is distinct and readily severable from the claim that is the primary focus of this appeal.

However, if the claims are severable, then the proportionality approach would be appropriate. *Transpac Development, Inc. v. Oh*, 132 Wn. App. 212, 130 P.3d 892 (2006); *Marassi v. Lau,* 71 Wn. App. 912, 916, 859 P.2d 605 (1993). Under such a proportionality approach, Respondents would recover at least the vast majority, and potentially all, of their fees. Thus, if

Respondents obtain reversal on this issue it will not make a material difference whether the trial court employs the substantially prevailing party approach or the proportionality approach.

C. Buyers' Assertion that Respondents Did Not Respond to Buyers' Arguments Regarding Revision of the Summary Judgment Is Untrue and Irrelevant.

Buyers' final argument in response to Respondents' cross-appeal is that they are entitled to judgment in their favor for the amount of their deposit and that "[t]his is especially true since Developers did not even respond to Buyers' arguments that the trial court erred in not amending the order granting summary judgment." (Reply, p. 28.)

Buyers' claim is untrue. Respondents address the argument early in their argument for their attorney fees, noting that "[b]ecause Respondents should have been awarded their fees regardless of whether 'judgment' is entered in Buyers' favor, any error by the trial court in failing to enter such judgment was harmless." (Respondents' Opening Brief, p. 42, fn. 7.)

If this Court affirms the trial court's dismissal of Buyers' complaint and reverses its denial of Respondents' motion for attorney fees, Respondents do not care whether the Court conditions the dismissal on the return of the earnest money or orders that a judgment for that amount be entered. Respondents intend to tender the funds again in either event; they will likely

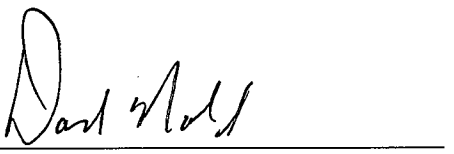
be again rejected. Respondents did not fail to respond to any argument important to Buyers' brief.

II. CONCLUSION

Buyers' claim that an award of fees to Respondents would be an "anomaly, indeed" is unsupported by authority and misstates the nature of the actions. These cases were not about the return of Buyers' earnest money, any more than they were between a Developer and the victims of "unfair surprise." (Reply, p. 11.) These were actions brought by sophisticated real estate agents against their principals for specific performance of self-dealing transactions. Respondents prevailed in those actions at the trial court. Under the Agreements and Washington law, Respondents are entitled to their attorney fees if the Court affirms summary judgment.

RESPECTFULLY SUBMITTED this 9th day of October, 2006.

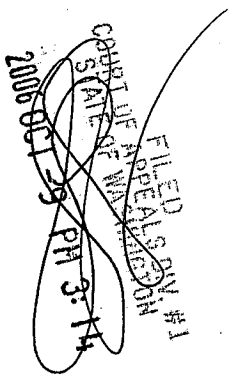
NOLD & ASSOCIATES, PLLC



David A. Nold, WSBA #19009
Brian M. Muchinsky, WSBA #31860
Attorneys for Respondents

IN THE COURT OF APPEALS
IN AND FOR THE STATE OF WASHINGTON
DIVISION ONE

JOANNE FAYE TORGERSON, as trustee for the TORGERSON FAMILY TRUST Appellant, v. ONE LINCOLN TOWER LLC, a Delaware limited liability company, et. al. Respondents.	No. 58031-1-I DECLARATION OF SERVICE
MICHAEL MILLER and VICKI RINGER, Appellants, v. ONE LINCOLN TOWER LLC, a Delaware limited liability company, et. al. Respondents.	No. 58030-2-I



I, JODI GRAHAM, hereby declare as follows:

1. I am employed by the law firm of Nold & Associates, PLLC, a citizen of the State of Washington, over the age of

18 years, not a party to this action, and am competent to testify herein.

2. On October 9, 2006, I caused the following documents:

a. Respondents' Reply Brief;

b. Respondents' Response to Appellants' Motion to Supplement the Record; and

c. Declaration of Service;

to be served on the attorneys at the following addresses via ABC Legal Messenger:

Dennis McGlothin
Olympic Law Group
1221 East Pike Street, Suite 205
Seattle, WA 98122

I certify under penalty of perjury under the laws of the State of Washington, that the foregoing is true and correct.

DATED this 9th day of October, 2006.

Jodi Graham